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IN THE

# Supreme Court of the United States

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VOLVO TRUCKS NORTH AMERICA, INC.,
*Petitioner*,

v.

REEDER-SIMCO GMC, INC.
*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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CLARK R. SILCOX *
General Counsel
NATIONAL ELECTRICAL
MANUFACTURERS ASSOCIATION
1300 N. 17th Street, Suite 1847
Rosslyn, Virginia 22209
(703) 841-3280

* Counsel of Record

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## BRIEF OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

## INTEREST OF THE *AMICUS CURIAE* [1]

The National Electrical Manufacturers Association (NEMA) is the leading trade association in the United States representing the interests of electroindustry manufacturers. Founded in 1926 and headquartered in Rosslyn, Virginia, NEMA's over 400 member companies manufacture products used in the generation, transmission and distribution, control,

[1] The parties' written consents to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than *amicus*, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief.

and end-use of electricity. Domestic shipments of electrical products within the NEMA scope exceed $100 billion. NEMA membership is divided across 53 different product groups including industrial automation equipment, lighting systems products, electronic equipment, electrical building equipment, electrical insulation products, wire and cable, power equipment sold to electric utilities, and medical imaging equipment. Under NEMA's By-Laws, one of its objectives is "to promote and further the interests of manufacturers of electrical products and the interests of the public in manufacturing, engineering, safety, transportation, and other problems of the electrical industry . . . and to promote the attainment of improved production, enlarged distribution, and increased efficiency in the use of electrical products." Many NEMA member products are marketed and sold through resellers to the ultimate customer under competitive conditions where the reseller requests a special pricing allowance to help win a customer's contract, and under the Eighth Circuit's interpretation of the Robinson-Patman Act in this case they will be compelled to forego or diminish offering competitive pricing allowances in heretofore entirely lawful, procompetitive transactions in order to avoid the risk of treble damage liability.

The questions presented for review in this case are of enormous significance for the manufacturers, distributors, and consumers of goods, including electrical products, sold in interstate commerce, because the Eighth Circuit Court of Appeals' decision in this case threatens substantially to reduce highly competitive project transaction pricing and supplant it with a greater incidence of price rigidity and more static market structures thereby harming competition, not preventing its injury. The Eighth Circuit's decision further threatens to disrupt efficiencies in the distribution channel by turning distributors who serve as important market makers for their suppliers' products and sources of value-added services into mere logistical supply managers.



One of NEMA's members who sells lighting systems components prevailed in a Robinson-Patman Act case based on a ruling that is entirely at odds with one of the holdings of the Eighth Circuit Court of Appeals in this case. Compare *Perkasie Industries Corp. v. Advance Transformer, Inc.*, 1992-2 Trade Cas. (CCH) ¶ 70,046 (E.D. Pa. 1992), *aff'd*, 19 F.3d 644 (3rd Cir. 1994).

*Amicus curiae* submits this brief to assist the Court in understanding the economic significance of the Robinson-Patman Act issues presented by this case, not just in the transactional circumstances present in truck distribution, but also in the context of other and different product distribution transactions that are faced by electrical manufacturers, distributors and their customers. *Amicus* urges the Court to reverse the judgment of the Eighth Circuit Court of Appeals in this case.

## IMPACT OF CASE ON DISTRIBUTION OF ELECTRICAL PRODUCTS

The electrical products whose distribution is potentially impacted by the ruling in this case are those products that are sold for use in building construction and renovation projects, the construction of new manufacturing plant or industrial equipment, the overhaul, upgrade, and expansion of manufacturing plant and equipment, and the construction of new or the overhaul, upgrade, and expansion of electric and other utility generation and transmission facilities. Collectively, these are recognized as project transactions, typically characterized by a request for bid from a project owner, general contractor, architect, or systems integrator, who is managing the project.

In these project transactions, the electrical manufacturer is solicited by an intermediary—an electrical distributor, an electrical contractor, an original equipment manufacturer (OEM), a systems integrator, a fabricator or "panel shop"—to

provide an off-book price quotation that the intermediary can rely upon in bidding for a contract or subcontract to supply goods and services to the project manager. In addition to the request for a bid or contract to the intermediary, there are two other important characteristics of these project transactions: (1) the electrical manufacturer will not be making sales to two purchasers for the supply of its product to the project, and (2) the intermediary will be providing to the project manager a bundle of goods and services that tend to vary from project to project.

The panel majority of the Eighth Circuit described the general circumstances presented by the *Volvo* case as follows:

> The majority of heavy-duty trucks sold by dealers are manufactured only after a retail customer has solicited and accepted bids from several dealers. During this competitive bidding process, dealers seek concessions from Volvo for a price below the initial wholesale price (80% of the published retail price), which then allows the dealers to offer lower prices to their customers. This is an industry-wide practice. To remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions. The crux of this case is Reeder's claim that Volvo gave other dealers more favorable price concessions than Volvo granted Reeder, which concomitantly reduced Reeder's profits on successful bids and increased the number of Reeder's unsuccessful bids.

*Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corporation*, 374 F.3d 701, 704 (8th Cir. 2004).

The distribution of many electrical distribution and control products mirrors the "built to order" model of distribution presented by the facts of the *Volvo* case. These may be engineered solutions specific to the project or, like the assembly of a Volvo truck, they are configured products based on a menu of assembling options. As detailed below, however,



the channel for the distribution of electrical products is more complex than the distribution of heavy trucks, and the Eighth Circuit's holdings in *Volvo*, if not reversed, will have a significant impact on these different channel scenarios as well. At the end of a very complex chain of distribution for electrical products used in these myriad projects, special allowances and discounts on a per-end customer basis increases manufacturer output, lowers prices for the end customer, and supports the delivery of value-added services by the reseller. These pro-competitive outcomes are threatened by the Eighth Circuit's *Volvo* decision.

In contrast to the distribution of Volvo trucks, the distribution of many other electrical products sold in competitive bid for contract or supply in project transactions is marked by a greater number of actors who have a role in the selection, marketing, and distribution of products for use in a particular project, and the fact that some products are also maintained in inventory either by the manufacturer or the distributor.[2] Unlike the case before the Court where there is a single class of truck distributor, many electrical manufacturers have multiple classes of reseller-customers who are engaged in project transactions as intermediaries between the electrical manufacturer and the end customer: electrical distributors, electrical contractors, general contractors, and systems integrators. By and large these different types of resellers do not compete with one another because they offer a different bundle of services with the commodities and

[2] To be clear, this brief is not addressing the pricing of electrical products that move through the distribution channel in a manner typically found in a traditional Robinson-Patman Act case. Many electrical products are sold to electrical distributors, electrical contractors, and to retailers such as hardware stores according to established price schedules recognizing appropriate differences in their functional role in the distribution channel. This brief addresses off-book pricing or special pricing allowances provided to enable a reseller to compete for a specific contract on a per-end customer basis.

customers will value those services differently based on the nature of the project;[3] however, because they could, under the Eighth Circuit's *Volvo* ruling be considered competitors for all purposes, the Eighth Circuit's holding in *Volvo* will negatively impact both competition and the end-customer in these project transactions.

For example, a manufacturer, after taking into consideration various factors such as the extent of inter-brand competition expected, any value-added services provided by the reseller to the ultimate customer, the extent of any historical relationships with the reseller's ultimate customer, the extent of future business it might anticipate, its production schedule, and any other unique aspects of the project, quotes a price and is awarded a purchase order for the sale of its product to a systems integrator who is competing for a contract to a construction company or industrial customer. Two months later, that systems integrator, who has either never or only rarely competed with an electrical distributor before, is now in head-to-head competition with one of the manufacturer's electrical distributors to supply the same type of product, but on this second project the systems integrator proposes to supply a competing manufacturer's product. If, in the second sale, after considering all the factors it previ-

[3] To illustrate the variation in services and value a particular intermediary brings to a transaction: a *fabricator or panel shop* will typically fabricate an enclosure and assemble inside the enclosure various components supplied by electrical manufacturers; a *systems integrator* provides electrical engineering services and integrates a variety of manufacturers' industrial automation and control products into a single solution for the end customer; an *OEM* will manufacture a complete machine assembly for a customer, sourcing electrical components from various manufacturers; an *electrical contractor* provides installation services to the project and under some circumstances may order product directly from a manufacturer; an *electrical distributor* sources and delivers electrical product to the project and may provide special warehousing, staging, kitting or subassembly services for the end customer.



ously considered in making a price quote, the manufacturer awards its distributor a price allowance that is greater than the allowance he previously quoted to the systems integrator on a different project two months earlier, the Eighth Circuit panel majority's opinion in this case exposes the manufacturer to a Robinson-Patman Act claim from the systems integrator for charging it a higher price two months earlier. Alternatively, if the manufacturer offers a lower price allowance to the electrical distributor on the second project, the Eighth Circuit panel majority's opinion exposes the manufacturer to a Robinson-Patman Act claim from the distributor regardless of whether the distributor is awarded a supply contract by the ultimate customer. Faced with the legal risk in the Eighth Circuit, the manufacturer's response is to establish a rigid, standardized price structure, stick to it, and to forego considering the unique competitive conditions in bidding on the project transaction.

Resellers of electrical products do represent, market, and distribute more than one manufacturer's products. In this regard, electrical distribution shares some of the characteristics of distribution described in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985), discussed *infra* in greater detail. Nevertheless, many electrical manufacturers do adopt some elements of a *limited distribution model* for their channel to the end customer. In the limited distribution model, manufacturers appoint a limited number of distributors (perhaps only one) to serve a particular customer base and/or geographic market, perhaps on an exclusive basis. Rigid territorial limitations are the exception, however. In the limited distribution model, it is not uncommon for the manufacturers to assign a distributor to an "area of primary responsibility." This system provides flexibility in channel management, enabling a manufacturer to minimize intra-brand conflicts among distributors that lead to inefficiencies in the distribution channel, but at the same time enabling their distributors to compete most effectively

and provide value-added services for their customers who want them. For example, some customers will prefer one distributor over another because of the package of value-added services and the resulting efficiencies being offered to them by the distributor.[4] Distributors, particularly those that have built strong relationships with their customers and the establishment of efficiencies in the process of serving those customers, will, from time to time, follow their more mobile customers outside of their primary area of responsibility and into a territory that is another distributor's primary area of responsibility as those customers expand nationally. The Eighth Circuit's holdings in *Volvo* threatens channel management flexibility that can serve the interest of ultimate customer: manufacturers will be forced to consider less flexible vertical restraints such as rigid restrictions on territories or customer types in order to avoid their distributors being considered competing purchasers in circumstances where they are not really competing.

Some electrical manufacturers adopt the *saturation model of distribution*, which involves multiple distributors serving a common customer base and/or geographic market on a non-exclusive basis. By its nature, the saturation model of distribution can involve significant intra-brand and inter-brand competition at the reseller level. Saturation distribution can be beneficial for both the distributor and their customers because it ensures availability of stock. To differentiate themselves from other resellers in these circumstances, distributors distinguish themselves with various services that their customers may value differently. Where intra-brand competition among resellers is present, the Robinson-Patman

[4] Such efficiencies are created in the form of value-added services and include local dedicated/customized inventory, dedicated delivery trucks, special payment terms, staging product for a project, kitting product or assembling a sub-assembly for a customer.



Act restrains a manufacturer's ability to charge different prices to functionally equivalent customers.

In both models of distribution, competition is intense for a project transaction because of the winner-take-all outcome. In that respect, it is very different from normal retail or wholesale competition where the competitor can try again to win the customer the following day or week on a subsequent sale to the same customer. Bidders for project transactions act opportunistically and strategically. Those manufacturers who, at a given moment, have excess capacity tend to bid more aggressively, and this translates into more output and lower prices for customers. Under the Eighth Circuit panel majority's opinion, the manufacturer will not be able to make incremental pricing decisions in the specific competitive bid context without having to roll that price allowance out to many other customers, past and future, who are not even competing for that project, but may have some distant competitive relationship elsewhere with the distributor who has solicited the manufacturer's special pricing allowance for the project. The inability of electrical manufacturers to consider each project transaction as a unique marketplace because of the risk of Robinson-Patman Act liability will have detrimental consequences for distributors and consumer welfare.

Resulting price rigidity would also act to eliminate the efficiencies and incentives of having electrical resellers act as "market makers" for their represented products and provide value-added services. The Eighth Circuit's decision, which will force manufacturers to offer uniform allowances based on how they priced in the past or how they anticipate they might have to price in the near future, will not allow the reseller to differentiate itself in the mind of its customer on the basis of price. Where customers seek out price competition through competitive bidding and contracting, as they do in sourcing electrical products, those customers will seek

to deal directly with manufacturers to avoid the impact of the Eighth Circuit's decision, trading off the services that make the sale and distribution of products more efficient for the better price. The reseller is then at risk for becoming little more than a logistics handler rather than the source of important services and serving as a market maker for the manufacturer's products.

Price rigidity will also reinforce incumbency in some contexts resulting in more stable market structures because the procompetitive opportunistic and strategic behavior described above will be restrained. There is a significant amount of replacement business in the electrical distribution and control market, and the incumbent supplier of the equipment to a particular customer typically enjoys a competitive advantage in the replacement and upgrade business. Price therefore becomes a key competitive factor when a bidder is trying to unseat its competitor for the supply of replacement components and upgrades. That competitive factor will be muted if the Eighth Circuit's judgment is sustained.

Although the distribution of electrical products is complex, members of *amicus* have developed legal compliance programs for the distribution of their products, including compliance with the Robinson-Patman Act. One of the tenets of these compliance programs is that if two or more of a given manufacturer's resellers are bidding to supply their products to the same project transaction, all other things equal, they will offer the same pricing allowance to each reseller.[5] On the other hand, each competitive project for which a bid is solicited is recognized as a unique competitive

[5] The panel majority's description of this case quoted above contained the following significant remark: "To remain competitive with other truck manufacturers, Volvo does not reveal its method of calculating concessions." This is true as well for electrical manufacturers bidding to have their products selected for project transactions.



event. The Eighth Circuit panel majority's opinion mars the traditional definitions and understandings of what constitutes local competition between resellers carrying the same brand. The manufacturer will now have to assume that all of its distributors are now potential competitors of each other (even though in practice they are not).

## SUMMARY OF ARGUMENT

In construing the Robinson-Patman Act, the judiciary has developed judicial "screens" to distinguish price differences that do not present a reasonable possibility that competition may be lessened from those that might. Thus, before an inference of anticompetitive effect can be drawn, courts have consistently required that discriminations be substantial and durable over time. Similarly, the text of the Act itself contains terms, which are at issue in this case, that operate to the same effect. The Act's requirement that discriminations in price must occur "between different purchasers" of commodities of like grade and quality effectively recognizes that a sale at one price and a mere offer to sell at a higher price cannot lead to a diversion of sales among competitors likely to lead to the "larger general injury" to competition. Similarly, the textual requirement in the RP Act that a discrimination in price injure, destroy or prevent competition with a person who "receives the benefit of" a discriminatory price, recognizes there must be a diversion of sales from a seller's disfavored customer to the seller's favored customer as a result of the price difference; absent that type of diversion, the courts are not dealing with injury to competition, but the consequences of competition itself.

The Court should avoid, as it has avoided in the past, a liberal construction of statutory terms in the RP Act that will invite speculation by finders of fact about an injury to competition that is no more than an "*un*reasonable possibility" or invites behavior by product sellers that is inconsistent with "the broader policies of the antitrust laws." The

Eighth Circuit's holdings erroneously invite impermissible speculation and judgments inconsistent with the other antitrust laws. To correct the legal error in the panel majority's opinion in this case, this Court should (a) adopt Judge Hansen's view that competitive bidding and quoting for contracts and projects creates a "unique marketplace" that is different than the typical RP Act case, see note 10 *infra*;[6] (b) hold that competition is only injured or prevented under the RP Act if, as a result of the price difference, there is a diversion of sales from the disfavored purchaser to a person who "received the benefit of" a lower price (or customers of them); and (c) hold that in a secondary-line injury case, a plaintiff cannot claim it was competitively injured if it did not make a purchase for resale in head-to-head competition, competing for the same dollar, with a person who received the benefit of a lower price.

## ARGUMENT

### I. THE RP ACT SHOULD BE CONSTRUED IN A MANNER THAT REFLECTS THE INTENT OF CONGRESS AND THE BROADER POLICIES OF THE ANTITRUST LAWS TO PROMOTE COMPETITION

The 1936 Robinson-Patman Act amendment to Section 2 of the Clayton Act, 15 U.S.C. § 13(a), proscribing discriminations in price where the effect is "to injure, destroy or

[6] We do not understand Judge Hansen to be saying that each transaction is a "relevant market" for antitrust purposes. We understand the phrase "unique marketplace" in the context of the competitive bid transaction merely recognizes that Section 2(a) of the RP Act regulates discriminatory pricing in an *intra-brand* setting between customers of the same seller and that intra-brand competition among resellers in this unique marketplace will be the exception. The "relevant market" concept appropriately focuses on pricing behavior in an *inter-brand* or inter-product setting.



prevent competition" departed slightly from the antitrust laws' historic focus on the consequences of monopoly and cartel practices that mimic monopoly or tend to create a monopoly. Historically, the antitrust laws, including the Sherman Act and the Clayton Act, were recognized by Congress to protect the public at large, specifically consumers, from a "larger general injury" to competition, widely understood to mean higher prices, reduced quality, and reduced output in the supply of goods. H. Hovenkamp, Antitrust Law ¶ 103 (2nd ed. 2000).

The Clayton Act, enacted in 1914 and aimed at proscribing certain competitive practices that Congress believed could lead to monopoly, required proof that the discriminatory price, the exclusive contract, or the acquisition of another business "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." In the Robinson-Patman Act, Congress added something slightly different to the calculus of competitive injury in the case of those who do not receive the same price from the same supplier. A cause of action is also available if the effect of the discrimination in price is "to injure, destroy, or prevent *competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. §13(a)(emphasis supplied).

As originally introduced in 1935, the Patman bill, which evolved to become the Robinson-Patman Act, contained no requirement that price differences cause injury to competition. H.R. 8442, 74th Cong., 1st Sess. (1935). The House Judiciary Committee held hearings on the Patman bill in 1935. *To Amend the Clayton Act: Hearings on H.R. 8442, 4995 and H.R. 5062 Before the House Committee on Judiciary*, 74th Cong., 2nd Sess. (1936) ("House Hearings"). While the hearings were underway, the Federal Trade Commission released its Final Report on its Chain Store Investigation, S. Rep. No. 4, 74th Cong. 1st Sess. (1935)

("Final FTC Report"). The Final FTC Report described data gathered by the FTC in its investigation of chain store practices, including the extent of preferences granted to chain stores, the growth of chain stores, the complaints of manufacturers, and advertising allowances granted to chain stores that were not used for advertising. House Hearings at 206. Notably, however, the Final FTC Report concluded that competition among chains and independents rendered the possibility of monopoly in retail distribution remote. Final FTC Report at 19. The most the FTC could say in its Final Report was that "should the trend of the past 20 years and particularly of the last decade continue for a like period we shall have a condition *in some of* chain store merchandising that few will dispute is monopolistic." *Id.* at 86. On the final day of the House Judiciary Committee hearings, the Final FTC Report was introduced into the record. House Hearings at 206. That same day, an amendment to the Patman bill was introduced and approved that would integrate the Patman bill's provision respecting price discrimination into the body of Section 2 of the Clayton Act and add the requirement that the discrimination in price was also unlawful if the effect was to "injure, destroy, or prevent competition with any person who . . . receives the benefit of such discrimination," the language now found in 15 U.S.C. §13(a). House Hearings at 251.

The following year, the House passed the amended Patman bill, containing this competitive injury requirement. A bill similar to the amended Patman bill was introduced in the Senate by Senator Robinson in 1936. S. 3154, 74th Cong., 2nd Sess. (1936). In explaining the new competitive injury element, the Senate Report explained that the generalized competitive injury requirement already found in the Clayton Act was "too restrictive," and that the bill now recognized that "only through injury to the competitor victimized by the discrimination can the larger general injury result." S. Rep. No. 1502, 74th Cong., 2nd Sess. 4 (1936). While liberalizing



the proof of competitive injury in secondary-line price discrimination cases, Congress was not abandoning a connection to "the larger general injury" as an element of the cause of action. The House Report responded to criticism that the legislation would "penalize, shackle, and discourage efficiency" as follows:

> In conclusion, your committee wishes to correct some important misapprehensions, and even misrepresentations, that have been broadly urged with regard to the probable effect of this bill. There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.

H.R. Rep. No 2287, pt. 1, 74th Cong., 2d Sess. 17 (1936).

### A. Construing the RP Act To Avoid Conflict With The Antitrust Laws Requires A Realistic Appraisal of Relevant Competitive Facts

Consistent with the House Judiciary's Committee's statement just cited, this Court has recognized in three cases that an interpretation of the RP Act that brings the Act into conflict with the other antitrust laws is to be resolved in favor of the values in the other antitrust laws. In *Automatic Cañteen v. FTC*, 346 US 61, 63 (1953), the Court eschewed enforcement of the RP Act beyond its express prohibitions because the Court concluded that a liberal construction of the act would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The potential for conflict was subsequently noted in *United States v. United States Gypsum*, 438 U.S. 422, 450 (1978), and a year later in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 83 (1979). In the latter two cases, this Court construed either the Sherman Act or the RP Act in a way that did not compel competitors to communicate with one another,

creating a risk of a Sherman Act violation, to verify their competitor's price to a customer in order to determine whether their price would "meet the competition" of the competitor. In the *A&P* case the Court noted:

> In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure ***would almost inevitably frustrate competitive bidding*** *and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.*

*Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979) (emphasis supplied).

Significantly, the inclusion of the term "competition" in Section 2(a) of the RP Act as well as its legislative history establishes that Congress was not federalizing a private tort remedy for injury to a competitor caused by unfair behavior. If Congress had intended otherwise, it would not have amended the Patman bill as it did to include a competitive injury requirement or recognize statutory defenses based on meeting a competitor's price, changing market conditions, or cost differences. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, 509 U.S. 209, 220 (1993) ("By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.")[7] Similarly, the specific statutory terms in Section 2(a) of the RP Act now before the Court in this case,

[7] In *Brooke Group*, this Court emphasized that the Robinson-Patman Act, like the other antitrust laws of which it is a part, as "passed for the protection of *competition*, not *competitors*." 509 U.S. at 224.



"different purchasers" and "receives the benefit of" reinforce that conclusion. These terms must be construed in light of the greater public harm that Congress sought to prevent.[8]

This Court's decision in *Morton Salt Co. v. FTC*, 334 U.S. 37 (1948) reviewed the adequacy of evidence needed to support a finding of competitive injury. In that case, the Federal Trade Commission found that Morton Salt granted discounts of 10 to 25 cents per case of salt, depending on volume, to large buyers. The Commission found that Morton's volume discount schedule, for which only four large retail grocery chains qualified for the lowest price, resulted in small retail merchants *purchasing* salt at wholesale at a price higher than the large chain stores *sold* at retail. *In re* Morton Salt, 40 F.T.C. 388 (1945). These discounts effectively prevented price competition in the resale of salt between large and small retailers. This Court found the price differentials were "sufficient in amount to influence their resale price," and the Commission was entitled to infer that these "substantial discriminations over time were a threat to competition." *Morton Salt Co. v. FTC*, 334 U.S. 37, 47 (1948).[9] More recently, however, this Court has endorsed the view that when a plaintiff relies on inferential proof of injury derived from "substantial price discrimination over time," as opposed to direct proof of diverted sales, the inference may be "overcome by evidence breaking the causal connection

[8] Judge Hansen, dissenting below, made essentially the same point, when he wrote, "My concern does not stem from a strict adherence to the two purchase requirement, but rather from my belief that "purchaser status" is inextricably intertwined with the existence of actual competition and the possible threat thereto." 374 F.3d at 718.

[9] The Court was forced, as a matter of practicality, to assume that, if it upheld Morton's pricing, every product in the grocery store would be subject to the same volume discount pricing that Morton charged for salt, and it therefore had to consider this broader impact on all grocery products in the store in considering the impact on competition. 334 U.S. at 49.

between a price differential and lost sales." *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). See e.g., *J. Truett Payne v. Chrysler Motors, Inc.*, 670 F.2d 575, 581 (5th Cir. 1982).

The Court in *Morton Salt* indicated the inclusion of the new competitive injury language in Section 2(a) represented a change from the Clayton Act's requirement for proof of harm to competition in "secondary-line" injury cases under the Act. The Clayton Act required proof that a proscribed practice "would *probably* have the defined effect on competition," whereas the Robinson-Patman Act only required a "reasonable *possibility*" that such an effect will flow from a price discrimination. *Federal Trade Commission v. Morton Salt*, 334 U.S. 37, 46-47 & n.14 (1948). Accord, *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). If the distinction between possibilities and probabilities reflects the policy choice made by the Congress in 1936, then it reflects that the legislature was willing to indulge in a greater degree of speculation about the tendency of a practice to lead to monopoly. It follows, however, that if this degree of speculation is permitted, the Court should avoid, as it has avoided in the past, a liberal construction of other terms in the RP Act that will invite speculation by finders of fact about an injury to competition that is no more than an "*un*reasonable possibility" or invites behavior by product sellers that is inconsistent with "the broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 & n.13 (1979).

The concept of competitive injury recognized in Section 2(a) of the RP Act is that a horizontal diversion of sales over time, from a disfavored purchaser to a competing purchaser who "receives the benefit of" a substantial discrimination in price, can lead to the same kind of injury to competition that the other antitrust laws were designed to prevent. It is the horizontal diversion of sales between competitors selling the



same manufacturer's product of like grade and quality, caused by a substantial discrimination in price over time that is fundamental to the construction of the RP Act and to its harmonization with the Clayton Act, which it amended, as well as the Sherman Act. The key for the judiciary is to be able to identify those circumstances where a diversion of sales caused by a discrimination in price could lead to an injury to competition of the magnitude that the Sherman Act and the Clayton Act proscribed.

Lower courts have uniformly recognized there can be a price difference that is both significant and relatively durable that will trigger the *Morton Salt* inference, subject to "breaking the chain of causation" recognized by the Court in *Falls City*. See generally Hovenkamp, Antitrust Law ¶ 2333c (1999) ("Discriminations of very low magnitude or short duration are typically rejected under a *de minimis* rule." (citing cases)). These judicially developed "screens" sort out potentially illegal price differences from those that are not illegal, because it is generally understood that discriminations of low magnitude or short duration cannot lead to a diversion of sales likely to lead to the "larger general injury" to competition contemplated by the antitrust laws.

The text of the RP Act includes several legislative "screens" to the same effect. The Act's requirement that discriminations in price must occur "between different purchasers" of commodities of like grade and quality effectively recognizes that a sale at one price and a mere offer to sell at a higher price cannot lead to a diversion of sales among competitors likely to lead to the "larger general injury" to competition. Except for the Eighth Circuit's decision in this case, lower courts have uniformly recognized this. See e.g., *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 615 (4th Cir. 1984); *M.C. Manufacturing Company, Inc.*, 517 F.2d 1059, 1066-67 (5th Cir. 1975). Similarly, the textual requirement in the RP Act that a

discrimination in price injure, destroy or prevent competition with a person who "receives the benefit of" a discriminatory price, recognizes there must be a diversion of sales from a seller's disfavored customer to the seller's favored customer as a result of the price difference; absent that type of diversion, the courts are not dealing with injury to competition, but the consequences of competition itself. Lower courts have held that a plaintiff must prove that the price discrimination adversely affected head-to-head competition in sales of the defendant's products between the disfavored and favored purchasers. See e.g., *Perkasie Industries Corp. v. Advance Transformer, Inc.*, 1992-2 Trade Cas. (CCH) ¶ 70,046 (E.D. Pa. 1992), *aff'd*, 19 F.3d 644 (3rd Cir. 1994).

The court of appeals below failed to apply this Court's prior guidance in *Automatic Canteen* on the construction of the RP Act:

> Since precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings. Familiar but loose language affords too ready a temptation for comprehensive but loose construction. We therefore think it is imperative in this case to confine ourselves as much as possible to what is in dispute here.

*Automatic Canteen Company v. FTC*, 346 U.S. 61, 65 (1952). In a like vein, the Court has cautioned:

> In appraising the effect of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.

*FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1963).



### B. The Court of Appeals Failed to Conduct A Realistic Appraisal of Relevant Competitive Facts in This Case And the Consequence is an Outcome That Harms Competition

The court of appeals failed to conduct a realistic appraisal of relevant competitive facts relating to competition for contracts and bid solicitations and how that competition differs from general retail or wholesale competition.[10] The "competition" protected by the antitrust laws, including the Robinson-Patman Act, is "determined by a careful analysis of each party's customers. Only if the they are each directly after the same dollar are they competing." *M.C. Manufacturing Company, Inc.*, 517 F.2d 1059, 1068 & n.20 (5th Cir. 1975) (firms competing for different bid contracts were in a "separate distinct market" from each other). Accord, *DeLong Equipment Company v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993) (competition requirement satisfied only after showing that "BCS and DeLong were after the same Pratt dollar"). This Court's decisions under the RP Act recognize no exception. See e.g., *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1982)("the lower retail prices in Henderson County attracted Indiana customers away from Indiana retailers, thereby causing the retailers to curtail

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[10] This is the view of Judge Hansen, dissenting below. *Reeder-Simco GMC, Inc. v. Volvo-GM Heavy Truck Corporation*, 374 F.3d 701, 718 (8th Cir. 2004):

> Traditional RPA cases involve sellers and purchasers that carry inventory or deal in fungible goods. By contrast, the parties in this case operate in a unique marketplace where special-order products are sold to individual, pre-identified customers only after competitive bidding. By its very nature, this process will never produce the kind of competition the RPA was designed to protect because it will never result in the type of two-purchase transaction that itself creates a market for the goods that are sold . . . It is the nature of competitive bidding, not price discrimination, that makes it so.

purchases from Vanco"); *FTC v. Sun Oil Co.*, 371 U.S. 505, 518 (1963)("certain of the dealers were able to identify customers, who, apparently retaining a preference for Sun products, shifted their patronage from the competing Sun stations to McLean"); *Corn Products Rfg. Co. v. FTC*, 324 U.S. 726, 739 (1945)(differentials were "enough to divert business from one manufacturer to another").

The Fourth Circuit's opinion in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 607 (4th Cir. 1985) reveals the kind of "realistic appraisal of relevant competitive facts" that is important in cases such as this.

> Commercial grade carpet, on the other hand, is generally sold through a competitive bidding process. Dealers in the commercial carpet market must engage in intensive sales work with architects, contractors, and purchasing agents in order to persuade them to specify of accept Lees carpet for a particular bid. While the Lees sales representative for the territory does some of this work, Lees relies to a great extent on its commercial dealers. Personal contacts, quality of installation, and reliability of service are much more important in the commercial market than in the residential market* * *
>
> The giving of such incentives is necessitated by the nature of the carpet industry. Carpet dealers, including both Terry's and Eatman's are normally authorized dealers for a number of manufacturers. The products of these numerous manufacturers are often interchangeable, and the purchaser of the carpet does not usually specify that only one brand may be used. Some incentive is necessary, therefore, to encourage a particular dealer to promote and bid one manufacturer's product over that of another manufacturer. Thus, Lees' marketing strategy is to choose those of its dealers that it believes will be most effective in marketing its products and to give those dealers a price discount to encourage them to promote and bid Lees carpet.



Lees Carpet principally recognized the plaintiff, Terry's Floor Fashions, as its dealer in the residential carpet market, but it did not designate Terry's one of its "major commercial dealers" that would entitle Terry's to receive price incentives for commercial carpet in competitive bidding situations. Lees did sell Terry's small amounts of commercial carpet at list price for negotiated jobs that did not involve competitive bidding. The Fourth Circuit affirmed the dismissal of the Robinson-Patman Act claim, because the Complaint alleged only that Lees sold to its "major commercial dealer" at lower prices than Lees quoted to Terry's for similar carpet. "Terry's had not shown, or even alleged, two comparable, completed sales and had therefore not satisfied one of the jurisdictional prerequisites for establishing a violation of Section 2(a)." *Id.* at 615.

Terry and Lees' "major commercial dealer" were both suppliers of Lees' commercial carpet. In this simplistic sense, one could say that the two dealers were in actual competition with each other. Furthermore, both dealers competed head-to-head for competitive bids in the commercial carpet market *but with different manufacturer's brands of commercial carpet*. What they did not do was to compete head-to-head in the sale of Lees' commercial carpet in competitive bids, and the Fourth Circuit correctly recognized that a Robinson-Patman Act claim was not presented by Lees' refusal to offer Terry's a discount on commercial carpet in competitive bidding situations. The Eighth Circuit's holding, that two dealers who both supply the same supplier's product in the same or sufficiently nearby geographic areas but do not divert sales from one another for the same supplier's product, are in competition with one another for RP Act purposes, would require Lees to change its distribution and pricing practices in a way that is likely to be less competitive and less efficient than the distribution system it established. Equally important, if the Eighth Circuit's holding had been applied in *Terry's*, the inference that the discrimination might injure or prevent

competition between Lees' two customers, which competition never really existed in the first place, and might "possibly" lead the market toward monopoly would be patently unreasonable.

In the case now before the Court, the plaintiff presented evidence of seven instances between 1996 and 1998 where it bid on contracts to supply Volvo trucks in order to show that it was competitively injured. In four of these seven instances, plaintiff *won the contract* in circumstances where plaintiff was *not* competing against another dealer bidding to supply Volvo trucks. Volvo provided plaintiff with a discount for each of these bids. The court of appeals held, despite the fact that there was no diversion of sales between a favored and disfavored purchaser of Volvo trucks, that plaintiff could claim he was less profitable on these sales than he should have been and this reduced profitability constituted an "injury to competition" for which plaintiff could recover damages under the RP Act. The basis for plaintiff's reduced profitability claim was that Volvo Trucks had granted other Volvo dealers who bid on different contracts for different customers in different States (against whom plaintiff did not compete for the contract), either months before or months after the plaintiff had prevailed on its bids, a greater discount than it had granted to plaintiff on the bids where plaintiff prevailed. In so ruling, the court of appeals ignored the statutory text that the effect of the price discrimination must be to "injure, destroy, or prevent competition with any person who . . . *receives the benefit of* such discrimination."

For manufacturers of electrical products, and likely many other manufacturers collaborating with their distributors to represent successfully their products on special construction projects or contracts, the Eighth Circuit's holding puts them in a competitive quandary that has ominous consequences for price competition. Different projects or contracts will present different advantages, disadvantages, and competitive opportunities for the manufacturer's products as well as the services to be offered by the reseller. These differing circumstances can affect the pricing allowances a manufacturer is willing to consider in bidding for a contract to see that its products are sold to its distributor's customer. Under the Eighth Circuit's holding, the manufacturer must, when offering a special allowance in February in one competitive bid transaction, consider whether it will be compelled by the threat of treble damage liability under the RP Act to offer the same discount *in a very different competitive bid situation in later months*, thereby chilling an incentive to offer a deeper discount in February. Alternatively, the manufacturer must consider that in offering a deeper discount in February in one competitive situation, whether it is restricted by the threat of treble damage liability under the RP Act to quote a smaller discount equal to one it granted *in a very different competitive bid situation months earlier*, thereby chilling an incentive to offer the deeper discount in February. Taking into account the risk of treble damage liability in these situations will lead to greater price rigidity. Faced with having to offer the same concession in different competitive bids, the manufacturer may be forced "blend" its assessment of the prospects for success in past or future bids and establish a uniform price allowance. This could force the manufacturer to offer no concession at all or a uniform concession that is less than it would offer in some cases and higher than what it would offer in other cases, potentially resulting in no sales rather than even one sale. Forcing the manufacturer to take into account the risk of treble damage liability in these individual bid competitions will lead to price rigidity and stability, and it will increase the likelihood of more stable market structures.[11]

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[11] In his treatise, Professor Hovenkamp notes that the RP Act "performs a little like the 'most favored nation' clause; it makes a selective price cut more expensive by requiring that the cut be given to

The same risk of stable prices and market structures is presented by the Eighth Circuit's holding with respect to two of the other three competitive bid situations for which plaintiff presented evidence in this case. In one of these situations, the plaintiff *failed to win the contract to supply Volvo trucks* where it was likewise not competing against another dealer bidding to supply Volvo trucks. In the second situation, plaintiff and another Volvo dealer both lost the sale to a non-Volvo dealer.[12] As in the case of the plaintiff's four successful bids, the court of appeals held, despite the fact that plaintiff did not "purchase" Volvo trucks and there was no diversion of sales between a favored and disfavored purchaser of Volvo trucks, that plaintiff could claim it lost the sales and profits on these sales and the lost sales and profits constituted an "injury to competition" for which plaintiff could recover damages under the RP Act.

Finally, the plaintiff was allowed to recover damages in one instance where it was in head-to-head competition with another Volvo dealer, Southwest, for a contract to supply Hiland Dairy. Both Volvo dealers were quoted the same discount by Volvo, bid the same price to Hiland Dairy, and the other dealer was selected for reasons having nothing to do with price. *Reeder-Simco GMC, Inc. v. Volvo-GM Heavy Truck Corporation*, 374 F.3d 701, 720 (8th Cir. 2004) (Hansen, J., dissenting) (a further price concession was offered to the successful Volvo dealer only *after* it had been selected by Hiland in order to accommodate a post-bid request from Hiland). Not only is the plaintiff not a purchaser

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other customers as well. . . .Faced with this situation, the firm will likely refrain from making the cut at all, with the result that the oligopoly is maintained." H.Hovenkamp, *Antitrust Law* ¶ 2340b1 (1999).

[12] The "Tommy Davidson" transaction did involve head-to-head competition between two Volvo dealers, but Davidson ultimately purchased Freightliner, not Volvo trucks. There was no purchase of Volvo trucks from anyone in this transaction.



in this situation, but given Volvo's policy of offering the same discount to Volvo dealers in head-to-head competition for the same end-customer, there is no indication that the additional discount offered to Southwest was not "functionally available" to plaintiff in this case had they requested it in response to Hiland's selection, which either negates the discrimination or causation of injury.[13] See generally, ABA Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Volume I, 106-08 (1980).

## CONCLUSION

The judgment of the Eighth Circuit Court of Appeals affirming the judgment of the District Court on the plaintiff's Robinson-Patman Act claim should be reversed.

Respectfully submitted,

CLARK R. SILCOX *
General Counsel
NATIONAL ELECTRICAL
MANUFACTURERS ASSOCIATION
1300 N. 17th Street, Suite 1847
Rosslyn, Virginia 22209
(703) 841-3280

* Counsel of Record

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[13] According to Judge Hansen, price discrimination was not the cause of the plaintiff's loss on this sale. Southwest, the other Volvo dealer, was Hiland Dairy's preferred supplier and that is the reason plaintiff did not prevail in the bid. Compare *Valley Products Company, Inc. v. Landmark*, 128 F.3d 398, 403-04 (6th Cir. 1997) (plaintiff's failure to be awarded preferred vendor status was the reason for loss of sales, not the alleged tying agreement); *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir. 1994)(denial of access to defendant's property was reason for loss of business, not the alleged market division).